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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/807,225	03/23/2004	Donald V. Edwards	SIM 04023	8484
7590		04/03/2009	EXAMINER	
JAMES RAY & ASSOCIATES			WATSON, ROBERT C	
2640 PITCAIRN ROAD			ART UNIT	PAPER NUMBER
MONROEVILLE, PA 15146			3723	
		MAIL DATE	DELIVERY MODE	
		04/03/2009	PAPER	

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte Simtec, Co.

Appeal 2009-1950
Application 10/807,225
Technology Center 3700

Decided¹: April 3, 2009

Before RICHARD TORCZON, SALLY C. MEDLEY, and MICHAEL P. TIERNEY, *Administrative Patent Judges*.

TIERNEY, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

A. STATEMENT OF THE CASE

This is a decision on appeal by the real party in interest, SIMTEC, CO., under 35 U.S.C. §134(a) from a final rejection of claims 1-5, 9-12, 14-16, and 27. The remaining claims were withdrawn due to a restriction requirement. We have jurisdiction under 35 U.S.C. § 6(b). We affirm-in-part and enter a new ground of rejection.

References Relied on by the Examiner

Younick	1,570,192	Nov. 2, 1922
Morgenberger	3,700,212	Oct. 24, 1972
Christensen et al.	6,354,570	Mar. 12, 2002

The Rejections on Appeal

The Examiner rejected claims 1-2, 4, 9-11, 14, 16, and 27 under 35 U.S.C. § 102(b) as unpatentable over Younick.²

The Examiner rejected claims 3, 5, 12, and 15 under 35 U.S.C. § 103(a) as unpatentable over Younick in view of Morgenberger, and Christensen.

The Invention

The present invention is directed to an apparatus for applying sufficient upward pressure to at least a portion of an object so as to lift the object a predetermined distance (Spec., p. 2, ll. 1-3).

² Appellant incorrectly identified claim 12 as rejected under § 102(b). (See Examiner's Answer mailed November 6, 2007 at 4 ("Ans") and Final Rejection mailed March 20, 2006 at 3).

The Appellant argues claims 1, 2, 3, 12, 14, 15, and 27 separately.

Claims 1 and 27 are the only independent claims on appeal. Claim 1 is reproduced below and is illustrative of the invention:

1. An apparatus for applying an upward pressure to at least a portion of an object to be lifted which is at least sufficient to lift such object a predetermined distance, said apparatus comprising:

(a) at least one elongated rod member formed of a first predetermined material and having a first predetermined shape;

(b) a first means engageable with a first end of said elongated rod member for gripping said apparatus during use;

(c) a second means one of formed integrally with said elongated rod member as a single piece and engageable as a separate piece at a first end thereof with a second end of said elongated rod member and extending outwardly therefrom for engaging such object to be lifted, and

(d) a substantially stationary third means engageable with and disposed closely adjacent an intersection of said second end of said elongated rod member and said first end of said second means, said substantially stationary third means being positioned for supporting and pivoting said apparatus.

(App. Br. Claims App'x).

Independent claim 27 is similar to claim 1, except that claim 27 requires the object engaging means possess a predetermined surface bearing area sufficient to prevent sidewise tipping of the apparatus during use.

Additionally, unlike claim 1, claim 27 does not identify a pivot means.
(App. Br. Claims App'x).

B. ISSUE

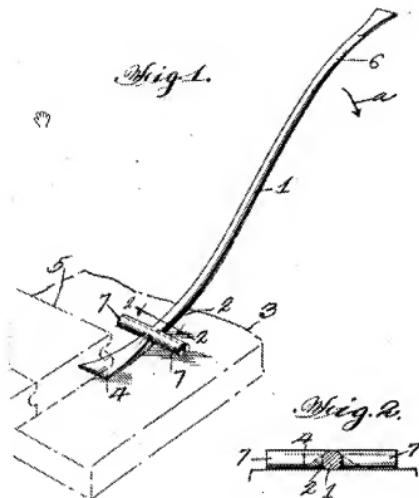
1. Has Appellant shown that the Examiner erred in finding that Younick teaches both: (a) a substantially stationary means for supporting and pivoting the apparatus, and (b) an elongated object engaging means having a predetermined surface bearing area which is sufficient to prevent sidewise tipping of the apparatus during use?

2. Has Appellant shown that the Examiner erred in determining that one of ordinary skill in the art would have had reason to employ plastic end caps, sleeves and grips, in view of the teachings of Younick, Morgenberger, and Christensen?

C. FINDINGS OF FACT

1. Younick discloses a wrecking bar. (Younick, col. 1, l. 6).

2. Younick's wrecking bar is depicted in Figures 1 and 2 reproduced below:



Younick's wrecking bar of Figures 1 and 2 is shown above.

3. Younick's wrecking bar is used to provide upward pressure on an object to be lifted. (Younick, col. 1, l. 38 to col. 2, l. 45, discussing "prying operation").

4. Younick's wrecking bar has a handle end 6. (Younick, col. 2, ll. 44-45).

5. Younick teaches an elongated object engaging means, "flattened end 4" for engaging objects to be lifted. (Younick, col. 2, ll. 42-43).

6. Younick's flattened end 4 is depicted as parallel to the supporting surface of Younick. (Younick, Fig. 1, col. 1, ll. 14-15).

7. Younick additionally teaches a pivot 7 positioned perpendicular to its flattened end 4 (object engaging means) for supporting and pivoting said apparatus. (Younick, col. 1, ll. 11-21, discussing "transversely disposed arms," and col. 2, ll. 45-59).

8. Younick teaches that the pivot 7 is useful for preventing marring or breaking of the support during a prying operation. (Younick, col. 1, ll. 18-21).

9. Morgenberger teaches a wheeled dolly for lifting an object. (Morgenberger, Abstract, col. 1, ll. 33-35).

11. Morgenberger's wheeled dolly supports an object 10 having a side panel 12, such as a snowmobile or the like. (Figure 3 and col. 2, ll. 38-40).

12. Morganberger's wheeled dolly includes end caps, "hand grips 60," and "resilient cups 40." (*Id.* at col. 3, ll. 1-4 and 24-27).

13. The Examiner found that one of ordinary skill in the art would understand Morganberger as teaching the use of grips and caps for lifting apparatus to prevent the tool from slipping and preventing damage to objects lifted by the tool. (Ans., p. 4).

14. Christensen discloses a lifting device. (Christensen, abstract, col. 2, ll. 9-12).

15. Christensen's lifting device is depicted in Figures 1-2, reproduced below:

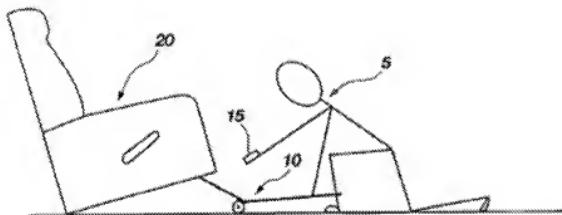


Fig. 1

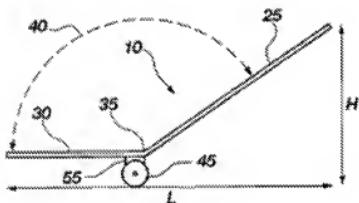


Fig. 2

Figures 1-2 of Christensen's lifting device are shown above.

16. Christensen discloses that the depicted lifting device may be made from a variety of materials, including plastic. (*Id.* at col. 7, ll. 29-34).

17. Christensen discloses an engagement plate 50 having an engagement surface that may be padded by a soft material, such as soft plastic, so as to prevent damage to objects. (*Id.* at col. 6, ll. 4-9).

18. Christensen further teaches the use of a wheel 45, which provides a pivoting point that is below the means for engaging the object to be lifted. (Figures 1-2).

D. PRINCIPLES OF LAW

Anticipation under 35 U.S.C. § 102 is a question of fact. *Brown v. 3M*, 265 F.3d 1349, 1351 (Fed. Cir. 2001). A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described in a single prior art reference. *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631 (Fed. Cir. 1987).

A claim is unpatentable under 35 U.S.C. § 103 when the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The combination of familiar elements combined according to known methods is likely to be obvious when it does no more than yield predictable results. *Id.* at 1739.

E. ANALYSIS

Anticipation

Claims 1-2, 4, 9-11, 14, 16, and 27 are rejected as anticipated under 35 U.S.C. § 102(b) by Younick.

The Examiner found that Younick describes a wrecking bar having a handle end 6 and a flattened end 4 for lifting. The Examiner also found that

Younick teaches outwardly extending arms 7 that aid in supporting and pivoting the wrecking bar. (Ans. p. 5-6). The Examiner states that Younick's flattened end 4 helps prevent sidewise tipping of the wrecking bar during use. (*Id.* at p. 3-4 and 6). The Examiner further found that one of ordinary skill in the art understood Younick's wrecking bar to be made of metal (steel) (*Id.* at p. 4). Based on these findings, the Examiner determined that Younick anticipated claims 1-2, 4, 9-11, 14, 16 and 27.

Appellant disputes the Examiner's findings. Appellant alleges that Younick fails to teach the claimed pivot means. According to Appellant, Younick's outwardly disposed arms cannot act as a pivot because it is in the same plane as the curved portion of the wrecking bar. (App. Br. p. 7-8).

As apparent from Younick Figure 1, the outwardly extending arms 7 serve as a pivot point for the bar. Specifically, when an operator applies a downward force on the handle 6, the bar pivots around the outwardly extending arms 7, so that flattened end 4 engages and applies force to the object to be lifted. Thus, we conclude that the Appellant has not shown the Examiner erred in finding that Younick teaches a means for supporting and pivoting the apparatus.

Appellant alleges, as to Claim 14, that Younick's pivot means does not include a "third predetermined material" as required by appealed claim 14. (App. Br. 9). Claim 14 requires that the pivot means includes a third predetermined material but does identify what the material is or whether it differs from other materials used in the apparatus.

Appellant's specification teaches that the claimed apparatus may be made from a variety of materials, including plastic or metal. (Spec. p. 11, ll.

19-20). Appellant's specification states that the first and second predetermined materials may be the same material. (Spec. p. 13, ll. 18-20). Appellant does not state where its specification requires the third predetermined material to differ from that of the first predetermined material. We provide claims with their broadest reasonable interpretation and conclude that the third predetermined material may be the same as the first predetermined material and can be metal.

Accordingly, we conclude that Appellant has not demonstrated that the Examiner erred in finding that Younick's pivot includes a third predetermined material (metal).

Appellant alleges, as to Claim 27, that Younick does not disclose an object engaging surface bearing area sufficient to prevent sidewise tipping during use. (App. Br., p. 9, l. 21 to p. 10, l. 2). We observe that Younick's flattened surface 4 appears to be of the same relative size and shape as applicant's flattened surface (compare Fig. 1 of Younick with Figs. 22-24, Elements 80/82 of Applicant's invention (discussed p. 15, l. 15 to p. 16, l. 9 of Spec.)). We find that Appellant fails to rebut the Examiner's finding that the flattened surface of Younick, having the same relative shape and size, of the Applicant's, would be able to prevent sidewise tipping. Accordingly, we conclude that the Appellant has not demonstrated that the Examiner erred in finding that Younick teaches an object engaging surface bearing area sufficient to prevent sidewise tipping during use.

Claims 4, 9-11, and 16, depend from claim 1 and are not argued separately. Accordingly we affirm the Examiner's rejections of these claims for the reasons that we affirm claim 1.

Appellant further states that Younick does not anticipate claim 2 because the pivoting means of Younick is not disclosed on an underside of the object engaging means. The Examiner fails to identify this feature with specificity. Accordingly, we reverse as to anticipation; however, as discussed below, we enter a new ground of rejection of claim 2 as obvious over the prior art.

Obviousness

Claims 3, 5, 12, and 15 stand rejected under 35 U.S.C. § 103 as unpatentable over Younick in view of Morgenberger, and Christensen. Claims 3, 5, 12, and 15 require the use of plastic on various portions of the lifting device.

The Examiner found Morgenberger teaches the use of both plastic hand grips and object engaging means. (Ans. p. 4). The Examiner also found Christensen teaches the use of a plastic object engaging surface. (*Id.*). The Examiner concluded that one of ordinary skill in the art would have employed plastic protectants on Younick's wrecking bar to prevent damage to the object being lifted and to prevent the wrecking bar from slipping out of a user's hand and/or slipping relative to the object being engaged (*Id.*, at p. 4-5).

Appellant alleges that, as for claim 3, the prior art failed to provide a reason to put plastic caps on the ends of the pivoting means. (App. Br., p. 11, ll. 3-5).

Morgenberger teaches the use of end caps 40 between a lifting device and an object to be lifted. (Morgenberger, col. 2, l. 67 to col. 3, l. 8, Figs. 1 and 3). Also, Younick clearly teaches one of ordinary skill in the art of the

problem of marring or breaking of the support during a prying operation. (Younick, col. 1, ll. 18-21). Accordingly, the combination of plastic end caps on Younick's pivot represents little more than the use of a known material for its known and predictable function, preventing damage. Thus, we find that the Examiner has not erred in determining that it would have been obvious to one of ordinary skill in the art to utilize plastic end caps.

Appellant further alleges that, as to claim 12, there would be no reason to cover the flattened end of the wrecking bar with a plastic sleeve (App. Br., p. 11, ll. 12-15). Appellant argues that since Younick is designed for pulling flooring boards and sidings, one would not use a plastic sleeve on the object engaging end (*Id.*). The Examiner found that one of ordinary skill in the art reading Younick would understand that the wrecking bar could be used to lift an object (Ans. p. 3). Accordingly, the Examiner implicitly found that Younick is not limited to lifting only flooring boards and siding. Appellant has not demonstrated that the Examiner erred in interpreting Younick in such a fashion. As to the use of a plastic sleeve, Morgenberger teaches the use of plastic sleeves and Christensen teaches the use of plastics, so as to prevent damage to objects being lifted. (Morgenberger, col. 2, l. 67 to col. 3, l. 8; Christensen, col. 6, ll. 4-9). Again, one of ordinary skill in the art would have understood that using plastic sleeves on the flattened end of Younick represents using a known material for its known and predictable purpose. Accordingly, we hold that the Examiner has not erred in determining that the use of a plastic sleeve would have been obvious to one of ordinary skill in the art.

As to claim 15, Appellant contends that the cited prior art does not teach the use of polyethylene in a pivoting means (App. Br., p. 11, l. 16 to p. 12, l. 12). Yet, Appellant does not dispute that polyethylene is a common plastic or allege that any unexpected result is achieved through the use of polyethylene. (App. Br., p. 12, ll. 1-3). The use of a known material (polyethylene) for a known use (plastic end caps) to achieve a predictable result (preventing damage) is obvious. Accordingly, we hold that the Examiner has not erred in determining that it would have been obvious to one of ordinary skill in the art to have utilized polyethylene.

Claim 5 depends from claim 1 and is not argued separately. Accordingly we affirm the Examiner's rejections of claim 5 for the reasons that we affirm claim 1.

Pursuant to our authority under 37 C.F.R. § 41.50(b), we enter a new ground of rejection of claim 2 under 35 U.S.C. § 103(a) as being obvious over Younick in view of Morgenberger, and Christensen.

Claim 2 requires that the pivoting means be on an underside of the object engaging means. Claim 3 depends from claim 2. Thus claim 3, includes the limitation of claim 2 along with the requirement that the pivoting means employ plastic caps on end portions. Consistent with our holding that claim 3 is obvious, we likewise conclude that claim 2 is obvious. Specifically, Christensen teaches one of ordinary skill in the art that it was known and predictable to locate a pivoting means on an underside of an object engaging means. Christensen as applied in the combination of

Younick in view of Morgenberger, as well as by itself, teaches the use of a pivoting means 45 located on an underside of an object engaging means 50, wherein the wheels of Christensen are interpreted as the pivoting means. (Christensen, figs. 1-2). Accordingly, in view of this teaching a person of ordinary skill in the art would have reasoned that it is both predictable and desirable to place a supporting and pivoting means on an underside of the object engaging means, so as to ensure that sufficient leverage to lift an object is created.

F. CONCLUSION

Appellant has not shown that the Examiner erred in determining that Younick teaches both: (a) a substantially stationary means for supporting and pivoting the apparatus, and (b) an elongated object engaging means having a predetermined surface bearing area which is sufficient to prevent sidewise tipping of the apparatus during use.

Appellant has not shown that the Examiner erred in determining that determining that one of ordinary skill in the art would have had reason to employ plastic end caps, sleeves and grips, in view of the teachings of Younick, Morgenberger, and Christensen.

G. ORDER

The rejections of claims 1, 4, 9-11, 14, 16, and 27 under 35 U.S.C. § 102(b) as anticipated by Younick is affirmed.

The rejections of claim 2 under 35 U.S.C. § 102(b) as anticipated by Younick is reversed.

The rejections of claims 3, 5, 12, and 15 under 35 U.S.C. § 103(a) as unpatentable over Younick in view of Morgenberger, and Christensen is affirmed.

We have also entered a new ground of rejection against claim 2 under 37 C.F.R. § 41.50(b).

37 C.F.R. § 41.50(b) provides that, “[a] new grounds of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the Appellants, *WITHIN TWO MONTHS FROM THE DATE OF THE DECISION*, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of proceedings (37 C.F.R. § 1.197 (b) as to the rejected claims:

- (1) Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner...; or
- (2) Request that the proceeding be reheard under 37 C.F.R. § 41.52 by the Board upon the same record ...

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART; 37 C.F.R. § 41.50(b)

ack

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